

REMARKS

The above amendments and following remarks are submitted in response to the Official Action of the Examiner mailed February 25, 2003. Having addressed all objections and grounds of rejection, claims 1-22, being all the pending claims, are now deemed in condition for allowance. Reconsideration to that end is respectfully requested.

Claims 5, 15, and 19 were rejected under 35 U.S.C. 112, second paragraph, as containing trademark limitations. Provided above is a "clean" copy of all pending claims containing amendments to the claims which are deemed fully responsive to this rejection. Support for these amendments is found within Appendix A.

The Examiner has maintained her prior art rejections under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,621,892, issued to Cook in view of U.S. Patent No. 6,347,330B1 issued to Dawson et al. In Applicant's previous response, a declaration was submitted under 37 C.F.R. 1.131 to remove Dawson et al as a reference.

The Examiner has stated:

The declaration filed on January 17, 2003 under 37 CFR 1.131 has been considered but is ineffective to overcome the Dawson et al. reference.

An affidavit or declaration under 37 CFR 1.131 is not appropriate in the following situation: Where applicant has clearly admitted on the record that subject matter relied on in the reference is prior art. In this case, that subject matter may be used as a basis for rejecting his or her claims and may not be overcome by an affidavit or declaration under 37 CFR 1.131. In re Hellsund, 474 F.2d 1307, 177 USPQ 170 (CCPA 1973) Note MPEP 715.

Note paper number five in which COOL ICE User's Guide Release 1.1 was cited, Applicant has admitted in the declaration that claims 1-22 are embodied in this reference which has a publication date (sic) March 1997.

This position of the Examiner appears to be incorrect as a matter of law and contains at least one clearly erroneous finding of fact.

The Examiner states that Paper No. 5 cites Cool ICE User's Guide Release 1.1. This finding is believed to be incorrect. According to Applicant's records, Paper No. 5 is an Official Action of the Examiner. A cursory review of Paper No. 5 has not revealed any reference to Cool ICE User's Guide Release 1.1 by the Examiner.

Applicant cited Cool ICE User's Guide Release 1.0 by way of an Information Disclosure Statement and PTO 1449. It is believed that this is Paper No. 2. This disclosure is governed in part by 37 C.F.R. 1.97(h) which provides:

The filing of an information disclosure statement shall not be construed to be an admission that the information cited in the statement is, or is considered to be, material to patentability as defined in §1.56(b).

Thus, to the extent that the Examiner finds Applicant's submission of an Information Disclosure Statement to be an admission, she is incorrect as a matter of law.

In addition, it is Cool ICE User's Guide Release 1.0 which is prior art to Applicant's invention. As stated in Applicant's declaration, the invention was first incorporated in Cool ICE Release 1.1, which is a subsequent release of the product including additional features, such as Applicant's claimed invention.

Therefore, assuming proper application of the facts of record and the controlling law, it is assumed that Dawson et al is removed as a reference.

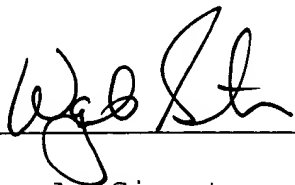
Having thus responded to each objection and ground of rejection, Applicants respectfully request entry of this amendment and allowance of claims 1-22, as amended, being the only pending claims.

Respectfully submitted,

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By his attorney,

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